Agensi Pekerjaan Talent2 International Sdn Bhd v Kenneth Yong Fu Loong & Anor

HIGH COURT — SUIT NO 22NCVC-238 OF 2011
AMELIA TEE ABDULLAH JC
4 JULY 2011

Civil Procedure — Injunction — Balance of convenience — Defendant left plaintiff's employ to join rival company — Defendant covenanted not to do business with plaintiff's clients in competition, use plaintiff's confidential information or induce plaintiff's staff to leave company — Whether covenants breached — Injunction sought to enforce covenants — Whether serious issues to be tried — Whether plaintiff able to meet undertaking as to damages

The plaintiff was part of the Talent2 Group of Companies, a multinational recruiting company whose principal business was providing outsourcing services for functions such as payroll and the search and recruitment of executives. The first defendant ('Kenneth Yong') was in the plaintiff's employ but resigned to join another company that was in competition with the plaintiff, Kelly Services Sdn Bhd ('Kelly Services'). Kenneth Yong had contractually agreed with the plaintiff to, inter alia: (i) not to disclose to third parties, or make use of, except for the plaintiff's benefit, any confidential information belonging to Talent2; (ii) for a specified period after ceasing employment with the plaintiff, not to induce or attempt to induce any of the plaintiff's employees to leave the company; and (iii) not to provide competing services to any client of the plaintiff after leaving the company. The plaintiff claimed that when Kenneth Yong left its employ, he took with him four other employees who comprised 'his team' in the company and they joined Kelly Services. It was alleged that Kenneth Yong and his 'team' subsequently invited two employees of the plaintiff to quit the company and join Kelly Services, used confidential information belonging to the plaintiff to contact and do business with the plaintiff's clients and generally did acts that unlawfully interfered with the plaintiff's business and caused it to suffer loss and damage. The plaintiff applied to court for an injunction to restrain Kenneth Yong and his agents from breaching the terms and conditions he had agreed to observe. Kenneth Yong denied he had breached his contractual obligations and denied the plaintiff's various allegations. He said the clients he had dealt with were all long-standing clients of Kelly Services as the latter had been operating in the Malaysian recruitment market for 23 years longer than the plaintiff. Due to the similar nature of business of the plaintiff and of Kelly Services, he said there was bound to be an overlap in the clientele of both companies and if he was prevented from dealing with any of their mutual clients, he would be unable to

fulfil his contractual obligations with Kelly Services and might lose his job as a result. Kenneth Yong also said the members of his 'team' who had left the plaintiff did so on their own accord and without his inducement. He said the relief sought by the plaintiff amounted to a restraint of trade which was avoided by s 28 of the Contracts Act 1950.

Held, allowing the application with costs to be taxed:

(1) There were serious issues to be tried in this case. Apart from the issue of breach of the non-solicitation provision, there was the issue of whether Kenneth Yong's actions were contrary to other terms of his contract of employment with the plaintiff such as the requirement to be honest and to act in good faith, maintain appropriate ethical standards and to use his best endeavours to protect and promote the plaintiff's business (see para 21).

(2) The events of 17 January 2001 (when Kenneth Yong and his 'team' resigned from the plaintiff to join Kelly Services) and its significance was a serious issue to be determined, as to whether it would tantamount to a breach of a duty of fidelity obligation (see paras 22–23).

(3) The balance of convenience favoured the plaintiff. What the plaintiff was seeking to do was to enforce what the defendant had contractually agreed to do. The plaintiff was also capable of meeting its obligations as to damages (see para 30).

(4) The court was satisfied that in the event the defendant succeeded at trial, damages would be an adequate remedy (see para 34).

[Bahasa Malaysia summary

Plaintif merupakan sebahagian daripada kumpulan syarikat Talent2, sebuah syarikat perekrutan multinasional yang menjalankan perniagaan utama memberikan perkhidmatan kepada pihak ketiga untuk fungsi seperti gaji dan carian dan perekrutan eksekutif. Defendan pertama ('Kenneth Yong') bekerja dengan plaintif tetapi berhenti untuk bekerja dengan syarikat lain yang bersaing dengan plaintif, Kelly Services Sdn Bhd ('Kelly Services'). Kenneth Yong telah bersetuju secara kontraktual dengan plaintif untuk, antara lain: (i) tidak mendedahkan kepada pihak ketiga, atau menggunakan, kecuali untuk manfaat plaintif, apa-apa maklumat sulit milik Talent2; (ii) tempoh masa tertentu selepas berhenti bekerja dengan plaintif, tidak mempengaruhi atau cuba mempengaruhi pekerja plaintif meninggalkan syarikat; dan (iii) tidak memberikan saingan perkhidmatan kepada mana-mana pelanggan plaintif selepas meninggalkan syarikat. Plaintif mendakwa bahawa apabila Kenneth Yong meninggalkan tempat kerjanya, dia telah membawa bersamanya empat pekerja lain yang terdiri daripada 'kumpulannya' dalam syarikat dan mereka masuk bekerja dengan Kelly Services. Adalah dikatakan bahawa Kenneth Yong dan 'kumpulannya' kemudian mempelawa dua pekerja plaintif untuk berhenti

daripada syarikat itu dan bekerja untuk Kelly Services, menggunakan maklumat sulit milik plaintif untuk menghubungi dan berniaga dengan pelanggan-pelanggan plaintif dan secara umumnya bertindak menyalahi undang-undang mengganggu perniagaan plaintif dan menyebabkannya mengalami kerugian dan kerosakan. Plaintif telah memohon kepada mahkamah untuk injunksi bagi menghalang Kenneth Yong dan ejen-ejennya daripada melanggar terma dan syarat yang dia telah bersetuju untuk patuhi. Kenneth Yong menafikan dia telah melanggar tanggungjawab kontraktualnya dan menafikan pelbagai dakwaan plaintif. Dia berkata pelanggan-pelanggan yang dia berurusan semua merupakan pelanggan lama Kelly Services kerana ia telah pun beroperasi di pasaran perekrutan Malaysia lebih 23 tahun daripada plaintif. Akibat daripada jenis perniagaan sama plaintif dan Kelly Services, dia berkata memang akan berlaku pertindihan pelanggan dalam kedua-dua syarikat dan jika dia dihalang daripada berurusan dengan mana-mana pelanggan mereka yang sama, maka dia tidak boleh memenuhi tanggungjawab kontraktualnya dengan Kelly Services dan mungkin kehilangan pekerjaan akibat daripada itu. Kenneth Yong juga berkata ahli-ahli 'kumpulannya' yang telah meninggalkan plaintif telah berbuat demikian atas kerelaan masing-masing dan tanpa dorongannya. Dia berkata relief yang dipohon oleh plaintif membentuk sekatan dagangan yang dielakkan oleh s 28 Akta Kontrak 1950.

Diputuskan, membenarkan permohonan dengan kos untuk ditaksir:

(1) Terdapat isu-isu serius yang patut dibicarakan dalam kes ini. Selain daripada isu pelanggaran peruntukan untuk tidak mencari pelanggan, terdapat isu sama ada tindakan Kenneth Yong bertentangan dengan terma lain dalam kontrak pekerjaannya dengan plaintif seperti keperluan bersikap jujur dan bertindak dengan niat baik, mengekalkan piawai etika yang sesuai dan berusaha sedaya upaya untuk melindungi dan mempromosikan perniagaan plaintif (lihat perenggan 21).

(2) Peristiwa 17 Januari 2001 (di mana Kenneth Yong dan 'kumpulannya' berhenti kerja daripada plaintif untuk bekerja dengan Kelly Services) dan signifikannya adalah isu yang serius yang perlu ditentukan, sama ada ia akan sama seperti pelanggaran kewajipan berhubung tanggungjawab kesetiaan (lihat perenggan 22–23).

(3) Imbangan kesesuaian berpihak kepada plaintif. Apa yang plaintif ingin lakukan adalah untuk menguatkuasakan apa yang defendan telah bersetuju secara kontraktual untuk lakukan. Plaintif juga boleh memenuhi tanggungjawabnya berhubung ganti rugi (lihat perenggan 30).

(4) Mahkamah berpuas hati sekiranya defendan berjaya dalam perbicaraan, ganti rugi adalah remedi yang mencukupi (lihat perenggan 34).]

Notes

For cases on balance of convenience, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3193–3203.

Cases referred to

Associated Tractors Sdn Bhd v Chan Boon Heng & Anor [1990] 2 MLJ 408; [1990] 1 CLJ (Rep) 30, SC (refd)

Hampstead & Suburban Properties Ltd v Diomedous [1969] 1 Ch 248 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Rajaram v Ganesh t/a Golden Harvest Trading Corp & Ors [1995] 1 SLR 159, HC (refd)

Svenson Hair Centre Sdn Bhd v Irene Chin Zee Ling [2008] 7 MLJ 903; [2008] 8 CLJ 386, HC (refd)

Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter [1992] 2 MLJ 689, SC (refd)

Legislation referred to

Contracts Act 1950 s 28

Elaine Yap (Azmimi Pharmy with her) (Wong & Partners) for the plaintiff.

R Ravindra Kumar (Deepak Mahadevan with him) (Raja, Darryl & Loh) for the defendants.

Amelia Tee Abdullah JC:

ENCLOSURE 3 — INTER PARTE INJUNCTION

[1] The plaintiff, Agensi Pekerjaan Talent2 International Sdn Bhd, had filed a summons in chambers seeking, inter alia, the following injunctive relief against the defendant, Kenneth Yong Pu Loong:

(a) An injunction until trial or further order that the defendant be restrained, whether by himself or his agent or otherwise, from doing or attempting to do the following:

(i) soliciting, enticing, or attempting to solicit or entice, either directly or indirectly, any present or former employee, consultant or agent of the plaintiff to cease acting as an employee, consultant or agent of the plaintiff for a period of six months from the date of his termination;

(ii) Disclosing to others or using for the defendant's benefit or the benefit of others, all or any or more categories of the plaintiff's confidential information as listed in Schedule A such as information concerning the plaintiff's clients, candidates or

business associates or otherwise exploiting the said confidential information without the plaintiff's consent;

(iii) Disclosing to others or making use of confidential information of the plaintiff's clients, candidates or business associates or other confidential information as listed in Schedule A to directly or indirectly approach, induce, solicit or persuade or attempt to approach, induce, solicit or persuade any person or entity who or which was or is a client of the plaintiff to undertake or perform work to undertake or perform work or services for that person or entity to cease doing business with the plaintiff or reduce the amount or business which the person or entity would normally do with the plaintiff;

(b) An order that the defendant, whether by himself or his agent or otherwise howsoever, deliver up all of the plaintiff's confidential information as listed in Schedule A, in any form whatsoever in the possession, power, custody or control of the defendant within 14 days of the service of the order of the court on the defendant or his solicitors, to the plaintiff or its authorised representative or agents.

[2] At the material time when the injunctive relief was applied for, the defendant, Kenneth Yong Fu Loong was the sole defendant and Kok Pik Yin was joined as a defendant only at a later stage. As such, this application is in relation to the first defendant, Kenneth Yong Fu Loong only.

BACKGROUND

[3] The plaintiff is part of the Talent2 Group of Companies, a multinational business group with its headquarters in Sydney, Australia. The plaintiff is a recruiting company and its principal business is the provision of outsourcing services for functions such as payroll, executive search and recruitment.

[4] The defendant commenced employment with the plaintiff on 7 January 2008. The terms and conditions of his employment are as set out in the letter of offer of employment dated 17 December 2007. The provisions relevant to this case are reproduced below for easy reference:

Clause 18 - Confidential Information

You agree to keep confidential at all times and not to disclose or make use of, except for the benefit of Talent2, at any time either during or subsequent to your employment any Confidential Information. 'Confidential Information' is further defined below.

You also agree not to deliver, reproduce, or in any way allow the Confidential Information or any document relating to the Confidential Information to be given to or used by any third parties without the specific direction or consent of a duly authorized representative of Talent2.

Your obligation to maintain the Confidential Information in confidence will only be relieved if you have the written consent of a duly authorized representative of Talent2 or if such disclosure is required by law.

If you are no longer employed by Talent2 (for whatever reason), you agree to promptly surrender and deliver to Talent2 all records, materials, equipment, drawings, documents and data of any nature pertaining to the Confidential Information.

Clause 20 - Post-Employment Restrictive Covenants

You acknowledge that:

(a) ...

(b) ...

(c) ...

You agree that upon the cessation of your employment for any reason, you must not for the Specified Period after the cessation of your employment, within any area that Talent2 operates its businesses, without the prior written consent of Talent2, directly or indirectly do any of the following:

(a) Induce or attempt to induce any director, manager or employee of Talent2 to terminate his or her employment or engagement with Talent2, whether or not that person would act in breach of that person's contract with Talent2;

(b) irectly or indirectly approach, induce, solicit or persuade or attempt to approach, induce, solicit or persuade any person or entity who or which was or is a client of Talent2 within the last 12 months of your employment with Talent2 to undertake or perform work or services for that person or entity or to cease doing business with Talent2 or reduce the amount of business which the person or entity would normally do with Talent2; or

(c) Directly or indirectly assist, approach, induce, solicit or persuade or attempt to assist, approach, induce, solicit or persuade any person or entity to undertake any of the activities restricted in the above sub clauses.

[5] The *specified period* for the restrictive covenant is:

(a) During the period of six months following cessation of employment or otherwise determined by Talent2 or a court; and

(b) during the period of three months following the cessation of employment.

[6] On 17 January 2011, the defendant tendered his resignation with the

plaintiff. He joined Kelly Services (Malaysia) Sdn Bhd ('Kelly Services'), a competitor of the plaintiff in February 2011.

THE PLAINTIFF'S AVERMENTS

[7] In his affidavit in support of the application for injunctive relief, Leigh Howard, the Director, South East Asia of the plaintiff avers that:

(a) On 17 January 2001, the defendant had handed over his letter of resignation together with the resignation letters of Kok Pik Yin, Wong Siew Kuen, Teo Kok Nian and Thirumagal Devaraj to Leigh Howard and had orally informed that he was taking his entire team with him;

(b) the defendant and his entire team are now employed with Kelly Services;

(c) he was informed by Linda Fraulein an office manager and Kalwinder Kaur a managing consultant of the plaintiff that the defendant together with Wong Siew Kuen, Teo Kok Nian and Kok Pin Yin had approached them on 10 February 2011 during lunch at Menara Weld and had invited or suggested that Kalwinder Kaur cease her employment with the plaintiff and join Kelly Services;

(d) on or around 17 February 2011, the defendant whether by himself or through one Thirumagal Devaraj had made use of confidential information to directly or indirectly approach, induce or solicit Malaysia Marine and Heavy Engineering Sdn Bhd ('Malaysia Marine'), an existing client of the plaintiff since 14 October 2010, to undertake or perform recruitment services from them. This was discovered through an email dated 18 February 2011 to the plaintiff for the attention of Thirumagal Devaraj which email contained the signed terms of business between Kelly Engineering and Malaysia Marine which was prepared by the defendant in his capacity as Consulting Director of Kelly Engineering;

(e) sometime in or around February 2011, the defendant made use of confidential information to contact Cameron (M) Sdn Bhd ('Cameron') for business. Cameron was a client of the plaintiff since 28 September 2010. This was discovered when Leigh Howard met Nicole Lee, the Human Resource Manager of Cameron and was informed that the defendant had contacted her between 1 February 2011 and 17 February 2011 for business; and

(f) on or around 4 November 2010, the plaintiff had presented the profile and arranged for an interview for its candidate named Mohd Azli bin Surip ('the candidate') for the position of quality manager but was unsuccessful. The assignment was handled by Leong Yee Leng and Kok Pik Yin. On or around February 2011, the defendant had, either through himself or through his agent, Kok Pik Yin, made use of confidential

information concerning the candidate by attempting to resubmit the candidate's resume to Air Products Malaysia Sdn Bhd ('Air Products') through Kelly Services.

On 24 February 2011, the plaintiff received an email from Air Products enquiring if the candidate would be interested in the position of quality engineer. However, when contacted, the candidate informed that Kok Pik Yin had called him two weeks earlier for the same position and forwarded his resume to Air Products.

[8] The plaintiff avers that the actions of the defendant amounted to unlawful interference with the plaintiff's trade and business and had caused the plaintiff to suffer loss and damage.

[9] In his affidavit in reply (encl 6), the defendant Kenneth Yong Fu Loong denied all the plaintiff's allegations. He states that he had been advised by his solicitors that some of the terms and conditions of employment were prohibited under local laws and therefore unreasonable and unconscionable. In claiming that he had never been in breach of his contractual duties to the plaintiff, the defendant further states that:

(a) Kok Pik Yin, Wong Siew Kuen, Teo Kuok Man and Thirumagal Devaraj had decided on their own accord to terminate their employment with the plaintiff and to join a competitor without any inducement or encouragement on his part. The said employees were headhunted independently by Glenn Thomas Davies, the General Manager of Professional and Technical, who had confirmed an affidavit to that effect;

(b) The said employees had tendered their resignation letters to the defendant as their immediate superior in the plaintiff. He claimed to have an obligation to inform his superior Leigh Howard about their resignations and to hand over the resignation letters to him;

(c) Although he was at Menara Weld on 10 February 2011 for lunch with Wong Siew Kuen, Teo Kuok Nian and Kok Pik Yin and had met and exchanged pleasantries with Linda Fraulein and Kalwinder Kaur, he denied any attempt to induce either Linda Fraulein or Kalwinder Kaur to cease their employment with the plaintiff and to join Kelly Services;

(d) The defendant denied relying on or using confidential information after the cessation of his employment with the plaintiff and avers that the plaintiff's clients and candidate information was created by various search methodologies compiled, obtained and extracted from information and sources available in the public domain;

(e) He denied ever being in breach of his contractual obligations to the

plaintiff or ever inducing, soliciting or persuading any person to cease doing business with the plaintiff or to reduce doing business with the plaintiff;

(f) Malaysia Marine was a long standing client of Kelly Services even before he joined Kelly Services. A contract between Kelly Services with Malaysia Marine signed on 13 August 2010 was tendered as proof. He claimed that the email sent to Thirumagal Devaraj was wrongly sent and that the terms and conditions of the contract signed between Kelly Services and Malaysia Marine dated 17 February 2011 were already agreed before he joined Kelly Services;

(g) The defendant avers that Cameron was also a long standing client of Kelly Services. A contract signed between Cameron and Kelly Services signed on 26 January 2010 was tendered as proof. He denied meeting or contacting Nicole Lee for business as alleged by Leigh Howard but claimed that after his departure from the plaintiff, all his dealings with Cameron had been with a Ms Florence Tan, the Senior Manager, Human Resource Asia Pacific and Middle East;

(h) According to the defendant, Air Products too was a long standing client of Kelly Services. He denied using information derived from his employment with the plaintiff. He claimed that the candidate's name was obtained by Kok Pik Yin through an 'Executive Search'. The candidate was then contacted and he emailed his resume to Kok Pik Yin after the defendant had left the plaintiff;

(i) Kelly Services had been operating in the Malaysian recruitment market since 1984 whilst the plaintiff had only been operating since 2007. As such, Kelly Services would have a bigger share of the recruitment market in the country.

[10] Thirumagal a/p Devaraj, Teo Kuok Nian, Liyana Michelle Wong Siew Kuen and Kok Piki Yin had all affirmed affidavits denying that they were induced by the defendant to leave the plaintiff to join Kelly Services but that they had all tendered their resignations on their own volition. In addition:

(a) Thirumagal a/p Devaraj averred in his affidavit (encl 7) that the contract between Malaysia Marine and Kelly Services dated 17 February 2011 contained a revision of the terms and conditions previously agreed between the parties on 13 August 2010;

(b) Teo Kuok Nian and Liyana Michelle Wong Siew Kuen stated in their affidavits (encsl 8 and 9) that when they met Linda Fraulein and Kalwinder Kaur on 10 February 2011, they had only exchanged pleasantries. They both denied that that the defendant or any of his other colleagues had invited or suggested that Linda Fraulein or Kalwinder Kaur cease their employment with the plaintiff to join Kelly Services;

(c) Kok Pik Yin averred that in February 2011, he was requested by Kelly Services to headhunt for candidates for the position of quality engineer. She then carried out an 'Executive Search' where many candidates were identified, including Mohd Azli bin Surip.

[11] Linda Fraulein a/p Stanley Christie Lawrence had affirmed an affidavit (encl 16) stating, inter alia, that on 10 February 2011 at Menara Weld, the defendant had commented or suggested to Kalwinder Kaur that she should end her employment with the plaintiff and join Kelly Services.

[12] Both parties have cited the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 as a leading authority in relation to the grant of interlocutory and interim injunctions. In that case His Lordship Gopal Sri Ram JCA held as follows:

> ... the correct approach to be adopted and the stages of reasoning involved in the process of arriving at the conclusion as to whether interlocutory injunctive relief should be granted or withheld are those that have been neatly summarised by Hashim Yeop Sani J, (as he was then)(in *Mohamed Zainuddin v Yap Chai Seng* [1978] 1 MLJ 40. This is what that very eminent judge said in that case (at p 42)):
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> Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits … Secondly if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The judge then considers the balance of convenience, and if the relevant factors were evenly balanced the court should grant an interlocutory injunction which would maintain the status quo. *It is said that at that stage the court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.* (Emphasis added.)

[13] And in the Supreme Court case of *Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689, Jemuri Serjan CJ (Borneo) observed that a judge hearing an application for an interim injunction should not, in his judgment, give the impression that he had in fact disposed off the main action on its merits.

[14] It is also relevant to note that what Gopal Sri Ram JCA said in the case of *Keet Gerald Francis*:

> To summarise, a judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:
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> First, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage.

> Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decide whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of the inquiry;
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> Second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would provide by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief.
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> Thirdly, the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo … Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial.

[15] The court also notes that in the case of *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408; [1990] 1 CLJ (Rep) 30 the Supreme Court had held that 'the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the court acts upon the principle of preventing irreparable damage'.

THE DECISION

[16] In coming to a decision in this case, the court has adopted the approach so meticulously set out in the case of *Keet Gerald Francis*. Firstly, the court has carefully considered whether the totality of the facts presented discloses a bona fide serious issue to be tried. In this regard, the court has considered all relevant materials including the submissions of both parties. In coming to a decision, the court is mindful of the exhortations of the Court of Appeal that it must refrain from making any determination on the merits of the claim or any defence.

Whether there are serious issues to be tried

[17] The defendant submits that there is no serious question to be tried. The basis of this argument is that the plaintiff's claim is premised on two main grounds namely the alleged breach of the non-solicitation and duty of confidence clauses in the contract between the parties.

[18] On the breach of the non-solicitation clause, the defendant's argument is that the plaintiff's allegations on this score relates to matters arising before the cessation of the defendant's employment 'and is thereby irrelevant'. Further the employees alleged to have been enticed had filed affidavits confirming that they were not enticed or induced to leave the plaintiff's employment. There was also a letter from a Mr Glenn Thomas Davies from Kelly Services confirming that he had head hunted the defendant's colleagues independently.

[19] As regards the incident at Menara Weld, it is submitted that apart from the defendant denying the allegation, the three others who were together with the defendant at the time had affirmed affidavits stating that at no time did the defendant invite or suggest to either Linda Fraulein or Kalwinder Kaur that they cease their employment with the plaintiff and join Kelly Services. It was also pointed out that Kalwinder herself had not affirmed any affidavit in respect of the incident.

[20] On the breach of duty of confidence issue, the defendant had denied the allegations contending instead that the three clients specifically mentioned had all been clients of Kelly Services before the defendant's employment. Documents have been exhibited to show the existence of the prior contracts as well as an email correspondence from a Florence Tan from Cameron to confirm that it was she who had approached the defendant at Kelly Services in February 2011. On this score, it is submitted that there is no proof that the defendant himself had taken from or disclosed any evidence of the plaintiff.

[21] The defendant has also advanced an argument that that the relief sought by the plaintiff amounts to a restraint in trade which is caught by s 28 of the Contracts Act 1950 as the plaintiff is seeking an injunction to prevent the defendant from contacting or dealing with the plaintiff's clients. The defendant submits that due to the similar nature of business of the plaintiff and Kelly Services, there is bound to be some overlaps in the clients of both and if he is prevented from dealing with the mutual clients of both the defendant and Kelly Services, he will be unable to fulfil his contractual obligations and may well be terminated by Kelly Services.

[22] The court has considered these arguments and finds that there are serious issues to be tried in this case. The court finds that quite apart from the

issue as regards a breach of the non-solicitation provision, there is the issue as to whether the defendant's actions would be contrary to other terms of his contract of employment. As this court has already stated at the time of dismissal of the defendant's striking out application, these issues would include:

> whether it would be contrary to some other terms of his letter of employment such as the requirement to be honest and to act in good faith (cl 12(a)), to maintain appropriate ethical standards (cl 12(b)), and to use his best endeavors to protect and promote Talent2's business (cl 12(e)).

[23] The affidavits affirmed on behalf of the plaintiff would reveal that on 17 January 2001, the defendant had not only handed over his own letter of resignation but he had handed over the resignation letters of Kok Pik Yin, Wong Siew Kuen, Teo Kok Nian and Thirumagal Devaraj to Leigh Howard. There is also the averment that he had at that point in time orally informed Leigh Howard that he was taking his entire team with him. It is not disputed that the defendant and all four persons aforenamed are currently with Kelly Services. The events of 17 January 2001 and its significance is a serious issue to be determined during the hearing.

[24] Whilst the above episode may not strictly fall within the non-solicitation provision in cl 20, however it would nevertheless be a serious issue to be tried as to whether it would tantamount to a breach of a duty of fidelity obligation. This issue would require a careful perusal and consideration of the various incidences of alleged breaches.

[25] The court is satisfied that in this case there are serious questions of law and fact in dispute between the parties. That being so, the next step is to consider where the balance of convenience lies.

Where does the balance of convenience lie?

[26] It is the defendant's contention that the balance of convenience lies in its favour as the plaintiff had not established that it would suffer serious injustice apart from stating that the defendant will cause serious, incalculable loss in terms of misuse and potential disclosure of confidential information, loss of market share and erosion of the reasonable expectation of the plaintiff in the fidelity of its employees and that such loss cannot be quantified in money terms. The defendant contends that the plaintiff's reasons are baseless when viewed against the injustice that he may suffer if he is prevented from contacting or dealing with mutual clients of the plaintiff and Kelly Services. If he is prevented from carrying out his contractual obligations to Kelly Services,

it may render his position as consulting director redundant. Further, he will suffer loss of reputation as he may be perceived as a person without integrity and untrustworthy.

[27] The defendant claims that the balance of convenience lies in his favour as he will suffer irreparable harm, damage and losses which cannot be financially compensated.

[28] The plaintiff, on the other hand, contends that the balance of convenience, if it applies at all, lies in its favour. In the first place, it is the plaintiff's submission that the balance of convenience test is not intended to apply in every case. He cites the Singapore case of *Rajaram v Ganesh t/a Golden Harvest Trading Corp & Ors* [1995] 1 SLR 159 where Kan Ting Chiu J quoted Lord Diplock as saying that 'Where there is a clear breach the question of balance of convenience does not arise'. (*Hampstead & Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248).

[29] And even if the court is minded to apply the balance of convenience test, the plaintiff submits that the balance of convenience clearly favors the granting of an injunction against the defendant. If the injunction is granted and the defendant subsequently succeeds in his defence, he will not have suffered any loss as the injunction only seeks to restrain him from doing what he has covenanted not to do. On the other hand if the injunction is not granted and the solicitation of key personnel and further disclosure or use of confidential information is allowed to continue, the loss to the plaintiff will not be compensable.

[30] Further, it was been submitted that the essence of the plaintiff's action is to restrain disclosure. And once confidential information has been disclosed, no amount of damages can make it secret or confidential again.

[31] After carefully considering the submissions of both parties on this issue, the court finds that the balance of convenience would tilt in favour of the plaintiff. The court has carefully weighed the harm that the grant of an injunction would cause as against the harm that would result if it were not granted. The court agrees that in the final analysis what the plaintiff is seeking to do is to enforce what the defendant had contractually agreed to do. This factor and the fact that the plaintiff would be financially capable of meeting its financial obligations as to damages leads the court to make a finding that the balance of convenience lies in the plaintiff's favour.

Whether damages is an adequate remedy?

[32] Lastly, the court has considered whether damages would be an adequate

remedy in this case. The plaintiff contends that damages would not be an adequate remedy. If an injunction is not granted, the loss suffered by the plaintiff would be irreparable and incalculable in terms of losing its market share for which it had expended significant time and money to develop its customer and candidate lists as well the erosion of the reasonable expectation of the plaintiff in the fidelity of its employees.

[33] The defendant, on the other hand, argues that any loss suffered by the plaintiff, if any, can be compensated in monetary terms if the injunction is disallowed and the plaintiff succeeds in proving actual loss or damage from the defendant's alleged breach.

[34] On this issue, the court can do no better than to refer to the case of *Svenson Hair Centre Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903 ; [2008] 8 CLJ 386 where Vincent Ng J held as follows:

> I hold that *damages will not be an adequate compensation for the plaintiff in view of the very nature of the breach of contractual prohibition and confidence*, which make it difficult for the plaintiff to quantify monetarily its loss of patronage of customers and/or the long term loss and damage to the Bella Beauty Business business, strategies and competitiveness. *On the contrary, any damage occasioned to the defendant as a result of the grant of the injunction can be quantified as she is only an employee of the competing business for which she draws a salary and a commission on sales.* I find that the balance of convenience clearly lies in favour of the injunction being granted, and that the defendant would certainly be able to recover any damages (if and when awarded) from the plaintiff, a well established business entity, whereas even if damages were to be a sufficient remedy for the plaintiff the converse is doubtful. (Emphasis added.)

CONCLUSION

[35] In conclusion, the court finds that the questions posed in *Keet Gerald Francis* have all been asked and answered. The court finds that there are serious questions of law and facts to be determined at the trial. The court further finds that the balance of convenience leans in favour of the plaintiff for the issue of an interim injunction against the defendant. And lastly, the court is satisfied that in the event that the defendant is successful, the quantum of damages would be an adequate remedy.

[36] Accordingly, the court hereby allows the plaintiff's application in prayers (1)(a), (b) and (c), (2), (4) and costs to be taxed, if not otherwise agreed.

Application allowed with costs to be taxed.

Reported by Ashok Kumar